IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 12 of 1989

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

GAJRIBEN WD/D CHIMANLAL BHUKHANDAS & 3 - Appellant(s)
Versus
KANTILAL UTTAMRAM CHEVLI - Defendant(s)

==========

Appearance :

MS MR SH SANJANWALA ON BEHLAF OF MS VASUBEN P SHAH AND

MR RS SANJANWALA for Appellants
MR SURESH M SHAH for Defendant(s) : 1,
MR AR SHAIKH for Defendant(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 04/11/2006

ORAL JUDGMENT

1. Shri S.H. Sanjanwala, learned counsel for the appellants

and Mr.Mehul Sharad Shah, learned counsel for the respondent.

2. The appeal arises out of the judgment and decree dtd.14/12/1988 passed by the Assistant Judge, Surat in Regular Civil Appeal No.40 of 1985 whereunder the learned appellate judge confirmed the judgment and decree dtd.30/11/1984 passed by the Joint Civil Judge (J.D.), Surat in Regular Civil Suit No.637 of 1983.

3. The appeal has been admitted for hearing the parties on 6/2/1989, on the following substantial question of law;

(i) Whether the courts below have materially erred in holding that the relationship between the appellants and the respondent was that of licensor and licensee and also erred in holding that the court had jurisdiction to entertain and decide the suit?

4. The facts in nutshell are that the plaintiff filed the suit submitting inter-alia that one Chimanlal Bhukhandas was given licence to stay in the suit premises, the plaintiffs needs the premises and as he has revoked the terms of

the licence, a decree be granted. His submission was that Chimanlal Bhukhandas had executed a writing in favour of the plaintiff on 4/11/1967 whereunder Chimanlal Bhukhandas admitted that the property in suit belongs to the plaintiff, he was already occupying the property under some grace shown by the plaintiff, but from the date of the writing / agreement, he would continue to hold the property as a licensee.

5. The defendants after notice appeared before the trial court and submitted that the agreement dtd.27/4/1967 was a concocted and made-up document, Chimanlal Bhukhandas never affixed his signature to the document and even in case the said document was executed by Chimanlal Bhukhandas in favour of the present plaintiff, that would not adversely affect the right of the defendants or Chimanlal Bhukhandas, because they were occupying the suit property for more than 100 years as tenants on payment of rent of Rs.20.00 (Rupees Twenty only) p.m.. The defendants also submitted that a perusal of the document would show that it was simply a farce while in fact, the defendants were tenants being in exclusive possession as they have obtained electricity

connection in their name and are using the premises for the purposes of a factory.

6. After recording the evidence of the parties, the learned trial court after taking into consideration the entirety of the circumstances held that the relationship between the parties was that of licensor and licensee. It held that it had jurisdiction to try the suit and accordingly decreed the same. The appeal at the instance of the appellants – defendants failed, therefore, the appellants are before this Court.

7. Mr.Sanjanwala, learned counsel for the appellants submits that the execution of the document of licence will have to be seen with caution especially when the licensees were already in possession and are exercising their rights which are available to a tenant. He also submits that the court below is required to unveil true transaction between the parties and cannot simply accept the document on its face value. He also submits that the appellate court did not properly appreciate the evidence nor has taken into consideration the law as explained by the Supreme Court in A.I.R. 1989 S.C. 1816 (Capt.B.V.

D'Souza Vs. Antonio Fausto Fernandes), A.I.R. 1974 S.C. 396 (Qudrat Ullah Vs. Municipal Board) and A.I.R. 1959 S.C. 1262 (Associated Hotels' case). His further submission is that the appellate court misread the evidence and has misinterpreted the evidence to arrive at the finding that the appellants or their predecessors-in-title were not tenants.

8. Learned counsel for the respondent, however, supported the finding and submitted that the findings recorded by the two courts below are pure findings of facts and even otherwise when the courts below after interpreting document in light of the attending and surrounding circumstances have come to the conclusion relating to the facts, then such a finding would be pure finding of facts. He also submits that the two courts have applied their mind to the facts of the case and have taken into consideration each and every defence raised by the defendants. He prays for dismissal of the appeal.

9. The question framed by this Court relates to relationship between the party. If that relationship is held to be of landlord and tenant i.e. lessor and lessee only then the

later part of the question will have to be answered.

10. In the matter of Capt.B.V. D'Souza Vs. Antonio Fausto Fernandes (Supra), the Supreme Court was taking up a matter where the terms of the licence deed were pointedly pointing out as to what was the relationship between the parties. That was a case, where the Court observed that the appellant before them was paying a sum of Rs.350.00 p.m. on or before 5th day of each consecutive months, it was agreed between the parties that the appellant shall not sublet, under-let, or part-with the possession of the premises to any stranger, nor shall he keep the premises vacant for more than three months without the consent of the owner and that the lease shall be renewable after the period of licence is over at the instance of the licensee and in case the licensee did not wish to continue then he was required to issue one month's notice in writing. Considering the totality of the circumstances and on juxtapose reading of terms of the said document, the Supreme Court observed that the payment of the lease amount of Rs.350.00 per month before 5th of any consecutive month would lead to a presumption that it was a case of lease

agreement. The Court also observed that subletting or parting with the possession would only be available in a case of letting, therefore also the document would mean that it was a lease agreement. The Apex Court also observed that the facts that licence shall be renewable at the will of the licensee and issuance of the notice for month would also lead to the conclusion that the transaction was of lease.

11. In the present matter, I have gone through the document dtd.27/4/1967. As the two courts have found as a fact that the document was executed by Chimanlal Bhukhandas, I hold that the document was so executed by the said person. The said document does not contain any term of payment of rent or licence fee or compensation for use and occupation as a tenant. It does not say that the property would not be re-let nor possession would be parted with. It also does not say that the agreement between the parties would be renewable on expiry of the first writing at the instance of the person in possession or in case of vacation, the person in possession would be required to issue one month's notice in writing. A bare perusal and understanding of the

document would make it clear that Chimanlal Bhukhandas was admitting the fact that he was already in possession of the property for long many years, the possession was under the grace of the owner and from the date of the document, he was to continue in possession as a licensee. The document further says that as and when the owner demands possession, he would deliver back the possession.

12. It is to be noted that the document was executed somewhere on 27/4/1967 and the said Chimanlal Bhukhandas died in 1981. For long 14 years, Chimanlal Bhukhandas did not challenge the writing before any court, he was satisfied and content with the writing and he was also happy with his status of licensee, he never said before any authority that he was a tenant or the document was got executed from him under duress, coercion and pressure, he never asserted before any court nor sought a declaration or decree that the document be held to be not binding against his rights or interest or he be declared as a tenant. If for a long period of 14 years the person who executed document did not challenge the correctness of the assertion made in the

document which is signed by his ownself then any person who succeeds to the right of such executant would not be allowed to say that the document was in fact is not what it appears to be. I am not on the question of limitation, but at this stage I must observe that to challenge a writing executed by a person, such person has to file a suit within a period of three years. If the suit is not filed within a period of three years then the right to challenge the correctness, validity and genuineness of the document would be lost. In the present case, I again repeat that I am not making any observation on the question of limitation, because that was not the question raised before the courts below, but I simply wish to observe that for 14 long years, if Chimanlal Bhukhandas did not challenge the said writing then any person who succeeds to him would not be allowed to challenge the said writing, because a successor does not get any right, wider or larger than what the deceased had. In the present case, the deceased according to his own writing, accepted his status of licensee and if during his life time he did not challenge his status then any person succeeding to him would not be allowed to say that the writing would mean something else. The intention of the

deceased in not challenging the writing coupled with the fact of affixation of his signature on the writing would lead to one and only conclusion that the deceased admitted that he was a licensee in the premises.

13.In the matter of Qudrat Ullah (Supra), the Supreme Court had observed that there would be no simple litmus test to distinguish a lease as defined in Sec.105, Transfer of Property Act from a licence as defined in Sec.52 Easement Act, but the character of the transaction turns on the operative intent of the parties. To put it pithily , if an interest in immovable property, entitling the transferees to enjoyment, is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a licence is the legal result. According to the Supreme Court, marginal variations to this broad statements are possible and Exs.1 and 4 fall in the grey area of unclear recitals. Approving its earlier judgment in the case of Associated Hotels' case, the Supreme Court referred to Halsbury's Law of England as contained in para Nos.1022, 1023, 1024 and 1025;

“1022. PRINCIPLES FOR DETERMINING WHETHER

AGREEMENT CREATES LEASE OR LICENCE. In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licenser and licensee the decisive consideration is the intention of the parties. The parties to an agreement cannot, however, turn a lease into a license merely by stating that the document is to be deemed a licence or describing it as such; the relationship of the parties is determined by law on a consideration of all relevant provisions of the agreement, nor will the employment of words appropriate to a lease prevent the agreement from conferring a licence only if from the whole document it appears that it was intended merely to confer a licence. In the absence of any formal document the intention of the parties must be inferred from the circumstances and the conduct of the parties.

1023. NATURE OF GRANT OF EXCLUSIVE POSSESSION. The fact that the agreement grants a right of exclusive possession is not in itself conclusive evidence of the existence of a tenancy,

but it is a consideration of the first importance.

In deciding whether a grantee is entitled to exclusive possession regard must be had to the substance of the agreement. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee requires that he should have exclusive possession.

The grant of an exclusive right to a benefit can, however, be inferred only from language which is clear and explicit. If an exclusive right of possession is subject to certain reservations or to a restriction of the purposes for which the premises may be used, the reservations or restriction will not necessarily prevent the grant operating as a lease.

1024. WHEN GRANT CONFERRING EXCLUSIVE POSSESSION OPERATES MERELY AS LICENCE. A grant which confers the right to exclusive possession may operate as a licence in the following circumstances which negative the intention to

create a lease.

1025. INSTANCES OF AGREEMENTS CREATING LICENCES. A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession thereof, or the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in the land. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the possession and control of the owner, the agreement will operate as a licence, even though the agreement may employ words appropriate to a lease."

From perusal of the aforesaid four paragraphs, it would clearly appear that it would always be for a court to decide that what was the intention of the party and what rights were created. According to the Supreme Court, intention of the party coupled with the surrounding circumstances would be decisive factor and the question

of possession simpliciter whether it is exclusive or not would not be sufficient to decide the facts. According to the Supreme Court the fact that the agreement grants a right of exclusive possession is not conclusive evidence of the existence of a tenancy, but that can be a consideration of the first importance.

14. In the present case, I have already observed that the intention of the parties is reflected in the document and it is further strengthened by the conduct of Chimanlal Bhukhandas in not challenging the document during his life time for a long period of 14 years.

15. According to Mr.Sanjanwala, learned counsel for the appellants, the appellate court did not properly appreciate the question relating to earlier possession and exclusive possession of the appellants, it misread the evidence and statement of the defendant No.1 and the fact that the electricity connection has been obtained by the tenants in their own name and they are running a factory in the premises, have not been appreciated in their proper perspective.

16. It would not be proper on the part of the appellants to say that the courts below did not consider these arguments. This in fact would be uncharitable to two courts. The two courts have considered the circumstances floating on the surface of the record in their proper perspective rather threadbare, they have taken into consideration each and every circumstance, they have considered the question that the defendants were in possession prior to 1967. According to me that is one of the statements made in the document itself. Obtaining of an electricity licence or to run a factory in the licenced premises would again be not decisive to come to the conclusion that the transaction between the parties was of a lease in the given set of circumstances. A licensee may be entitled to obtain electricity connection, water connection and other facilities. After all, licensee also enjoys the possession, he uses and occupies the premises and to derive better benefit have better use, if he takes certain steps for proper and appropriate enjoyment then it cannot be said that the transaction which was originally a licence between the parties is to be held to be a transaction of lease. Running of a factory on the premises would again not decide the issue, that

would simply show that the appellants or their predecessors-in-title were in exclusive possession of the property. Exclusive possession is not the sole criteria to come to the conclusion that the transaction between the parties is that of a licensee. According to the Supreme Court, it is a consideration of the first importance. The observation simply mean that the fact is tobe considered in its true perspective but it is not to be taken as exclusive and absolute fact to hold that such transaction is a lease transaction.

17. In the present case, the plaintiff has proved certain facts on which two courts have held:-

(a) That Exh.20 – Agreement dtd.27/4/1967 was executed by Chimanlal Bhukhandas.

(b) The document does not contain any condition of payment of the rent.

(c) The document does not say that there exists relationship of landlord and tenant between the parties.

(d) Despite the assertion by the defendants that they are tenants, they have failed to prove existence of any rent note or rent receipt.

(e) Chimanlal Bhukhandas during his life time never challenged the said document or his status.

(f) The plaintiff had been successful in proving on the strength of preponderance of probabilities that the relationship between the parties was not that of landlord and tenant, but was of licensor and licensee.

Then, certain observations which are made in the Halsbury's Law of England or by the Supreme Court after taking into consideration the particular facts of some case, the observations would not decide the fate of this case.

18. It would again not be correct to say that the courts below have misread the evidence or misinterpreted the evidence. In fact, the Court after referring to the statement of the appellant No.1, interpreted the same in a proper manner. The said interpretation is said to be bad by the appellants' counsel. What a particular statement

would mean would be within the domain of the court which is interpreting the document and the statement. In the present case, the appellants failed to prove that they are tenants, while on the other hand, the plaintiff could successfully prove that relationship between the parties was that of licensor and licensee. After giving my thoughtful consideration to the totality of the circumstances, I must hold that the two courts below were absolutely justified in decreeing the suit. The question framed by this Court has to be answered in negative. I hold that the courts below did not err in holding that the relationship between the appellants and the respondent was that of licensor and licensee.

19. As first part of the question is answered against the interest of the appellants and as the relationship of landlord and tenant is not proved, the Civil Court would certainly have jurisdiction to hear and decide the matter.

20. The appeal deserves to and is accordingly dismissed with costs, which is quantified at Rs.3000.00 (Rupees Three Thousand only). Interim relief if any stands vacated.

21. Mr.Sajanwala, learned counsel for the appellants at this stage submits that the appellants be given some time to vacate the suit premises.

22. If within a period of four weeks from today, the appellants submit an undertaking in form of an affidavit before the trial court that latest by 31/1/2007, they will vacate the premises and also deposit costs awarded by all the three courts and mesne profit, if any, reserved in favour of the respondent – plaintiff, they shall be allowed to remain in possession of the property. If they fail in doing so, the decree shall become executable immediately.

23. Let a decree be framed accordingly.

(R.S. GARG, J.)

rafik